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IN THE

Supreme Court of the United States

October Term, 1965

No. 7221

MANUEL GOMEZ BARRIOS, JOSE GARCIA RODRIGUEZ, JOSE MANUEL VENTURA VENTURA, EVALDO ESCANDEL SOTO,

Appellants,

v.

STATE OF FLORIDA,

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

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No.

MANUEL GOMEZ BARRIOS, JOSE GARCIA RODRIGUEZ,
JOSE MANUEL VENTURA VENTURA, EVALDO ESCANDEL SOTO,
Appellants,

v.

STATE OF FLORIDA,

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF FLORIDA

JURISDICTIONAL STATEMENT

Appellants having appealed from a judgment of the Supreme Court of Florida, which affirmed appellants' criminal convictions in the Criminal Court of Record of Monroe County, Florida, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Supreme Court of Florida (R. 7, Appendix A, *infra*) has not been officially reported. There was no opinion in the Criminal Court of Record.

Jurisdiction

The appellants, Cuban nationals and the masters of fishing vessels owned by the Cuban Government, were convicted in the Criminal Court of Record, Monroe County, Florida, of violating the Territorial Waters Act of 1963,

Chapter 63-202 of the Laws of the State of Florida, effective May 29, 1963 (370.21 F.S.A.) by taking and possessing fish from territorial waters in the vicinity of the Dry Tortugas, Florida. Each appellant was sentenced to six months in the county jail, suspended on condition that a fine of $500 each be paid (R. 26). The fines were paid.

The convictions were affirmed by the Supreme Court of Florida in a judgment entered on April 14, 1965 (R. 7). The notice of appeal to this Court was filed on July 8, 1965 (R. 2). In both state courts, appellants had urged that the Florida statute on its face and as applied violated the Federal Constitution (*infra*, pp. 4-5). Appellants' time to file this jurisdictional statement was extended to November 8, 1965 by order dated August 27, 1965 of the court below.

Jurisdiction of this appeal is conferred in the Supreme Court by 28 U. S. C. § 1257(2). The following cases sustain the Court's jurisdiction: *Largent* v. *Texas*, 318 U. S. 418; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Hoyt* v. *Florida*, 368 U. S. 57.

Questions Presented

Whether the Territorial Waters Act of 1963, Appendix B, *infra*, page 14, is unconstitutional on its face and as applied in that (i) it interferes with the foreign relations, war and commerce powers of the federal government, (ii) it unreasonably discriminates against a particular class of aliens in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution, and (iii) it is unconstitutionally vague under the due process clause.

Statutes Involved

The statute involved is the Territorial Waters Act of 1963, Chapter 63-202 of the Laws of the State of Florida,

39th Legislature (370.21 F.S.A.). It is printed in Appendix B, *infra*, pp. 14-17.

Statement of the Case

The appellants are Cuban nationals domiciled in the Republic of Cuba; each was the master of a fishing vessel owned by the Cuban Government.

On February 1, 1964, a United States Coast Guard vessel placed appellants' vessels under surveillance in international waters off the Marquesas Islands, Florida (R. 50). The Commander of the Coast Guard vessel observed the Cuban vessels fishing, trolling and at anchor in international waters at various times for the next twenty-four hours (R. 46).

On February 2, 1964, the Coast Guard Commander observed the appellants' vessels fishing at points between 1.5 and 1.9 miles off East Key, the easternmost of seven islands of a group known as the Dry Tortugas.[1] The Coast Guard Commander ordered appellants to drop anchor (R. 53, 56).

The Coast Guard then boarded and inspected the appellants' vessels to determine whether any contraband or unusual electronic equipment was aboard. Nothing suspicious was found (R. 94, 96, 97). The Coast Guard then took the vessels to the Coast Guard base at Key West to make a further inspection (R. 99, 100). This inspection similarly established that there was nothing of a suspicious nature (R. 100). Nevertheless, the Coast Guard did not release the appellants "because they were observed fishing within the territorial waters of the United States and that was the basis for detaining them" (R. 103). The Com-

[1] The Dry Tortugas form a part of the Fort Jefferson National Park area, a "monument" created by federal statute, 49 Stat. 3430 (R. 61), and are patrolled by a United States Ranger (*ibid.*).

mander of the Coast Guard was under the impression that fishing in such water was a violation of a federal law (R. 103), later asserted by Secretary of State Dean Rusk to be 46 U. S. C. A. § 251 [50 Dep't State Bull. 277 (1964)].

However, "as this statute contains no penalties" said the Secretary, *ibid.*, the Coast Guard on February 5, 1964 delivered appellants to the Florida Conservation Department (R. 103) at the latter's request (R. 89, 90). A state officer filed informations in the Criminal Court of Record for Monroe County charging appellants with a violation of the state law and they were arrested by the state authorities.

At no time prior to the arrests were the appellants notified that they were within United States territorial waters, nor were they ever ordered to leave (R. 56).

On February 18, 1964, appellants' counsel filed and argued a motion to quash the informations (R. 21-24). The motion alleged, *inter alia,* that the act was unconstitutional in that (i) it was an exercise of the war, commerce and foreign affairs powers of the federal government, Constitution, Article I, Sections 8, 10; (ii) it denied equal protection in violation of the Fourteenth Amendment; and (iii) it was unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment. (See Appendix C, *infra,* p. 18). This motion was denied the same day (R. 25).

Appellants waived a jury and were tried before the court (R. 41). Following the State's presentation of evidence, appellants moved for judgment of acquittal on the same federal constitutional grounds urged in the motion to quash; the motion was overruled (R. 91-93). Appellants made a similar motion upon the close of their case, and that too was overruled (R. 108-118). Appellants were convicted and sentenced (*supra,* p. 2; R. 119).

They appealed directly to the court below and filed assignments of error in the trial court in accordance with

Florida's appellate practice (R. 30-33). These assignments of error set forth the same federal constitutional grounds which had been previously urged.

Pursuant to Article 5, Section 4 of the Constitution of the State of Florida, the Supreme Court of Florida has jurisdiction over direct appeals from Criminal Courts of Record only in those instances where the constitutional validity of a statute is directly and necessarily in issue.

The Supreme Court of Florida exercised such jurisdiction and heard oral argument limited to the question of the unconstitutionality of the act. On April 14, 1965, that court issued the following per curiam opinion;

> "Affirmed. See Uphaus v. Wyman, 360 U. S. 72, 79 Sup. Ct. 1040, 3 L. Ed. 2d 1090; Theodore R. Gibson, et al. v. Florida Legislative Investigating Committee, et al., Fla., 108 So. 2d 729, 360 U. S. 919, 79 Sup. Ct. 1433, 3 L. Ed. 2d 1535." (R. 7; Appendix A, *infra*, p. 13)

The Questions Are Substantial

1. The Territorial Waters Act is unconstitutional upon its face and as applied under Article I, Sections 1, 8 and 10, of the Constitution, because it interferes with the exclusive federal power over foreign relations, foreign commerce and war.[1] "Governmental power over external affairs is not distributed, but is vested exclusively in the federal government". *United States* v. *Belmont*, 301 U. S. 324, 330. See also *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 316-317, 319-321; *United States* v. *Pink*, 315 U. S. 203, 233; *Board of Trustees* v. *United States*, 289 U. S. 48.

The power is necessarily exclusive because it involves "the interests of the Union at large", *Holmes* v. *Jennison*,

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[1] *Cf. Skiriotes* v. *Florida*, 313 U. S. 69, involving a United States national.

39 U. S. (14 Pet.) 540; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Henderson* v. *Wickham*, 92 U. S. 259, and relations with other countries requiring a uniform national policy. See *Hines* v. *Davidowitz*, 312 U. S. 52 and *Chy Lung* v. *Freeman*, *supra*. This Court has only recently indicated the special national concern with territorial waters:

> "The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; . . . The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks. Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area."
>
> *United States* v. *California*, 332 U. S. 19, 35-36.

Congress, in enacting the Submerged Lands Act of 1953, 43 U. S. C. 1301, *et seq.*, recognized this exclusive power by reserving federal power over territorial waters where ". . . national defense, and international affairs" are at issue. 43 U. S. C. 1314(a), 67 Stat. 32.

The two cases cited by the court below, *supra*, page 5, are completely inapposite. They involved the state's right under its police power to investigate so-called subversive activities directed at its existence. This Court held in *Uphaus* v. *Wyman*, 360 U. S. 72, that this was not a field within the exclusive federal constitutional power and that the states had not been ousted from it by federal legislation.[2]

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[2] In the second case cited by the court below, *Gibson* v. *Florida Legislative Investigating Comm.*, 108 S. 2d 729, this Court merely denied certiorari, 360 U. S. 919, although in a later phase it upheld *Gibson's* rights under the due process clause; *Gibson* v. *Florida Legislative Investigating Committee*, 372 U. S. 579.

2. The state statute in terms directly interferes with the exclusive federal control over foreign relations in a number of obvious ways. (i) The Board of Conservation is required to deny licenses to the nationals of communist countries and signatories of treaties of amity and commerce with them. (ii) The Board is authorized to apply such traditional concepts of international law as "reciprocity and retorsion". Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1657 *et seq.* (2d rev. ed. 1951). (iii) The State presumes to allocate to the Secretary of State a function in its discriminatory process. (iv) Exemptions from criminal prosecution are based upon findings of "bona fide political asylum", another function of national sovereignty. See, *e.g., Factor* v. *Laubenheimer*, 290 U. S. 276; *Terlinden* v. *Ames*, 184 U. S. 270, 289; 1 Oppenheim, *International Law* § 338 (Lauterpacht 8th ed. 1955). (v) There are even overtones of "letters of marque and reprisal", exclusively a federal function, Constitution, Article I, § 8, cl. 11, and § 10, in the state's assumed power to confiscate the fishing vessels of countries beyond the pale.

3. Even if regulation of fishing by aliens in territorial waters were deemed to be a proper subject of concurrent federal and state regulation under the Constitution, *Cooley* v. *Board of Wardens*, 53 U. S. (12 How.) 299, 326, *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766-67, the area has been preempted by federal legislative and executive action. *Pennsylvania* v. *Nelson*, 350 U. S. 497; *Hill* v. *Florida*, 325 U. S. 538; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148. The statute, as applied, interferes with United States policies concerning both Cuba and commercial fishing.

(a) The United States Government is a party to many treaties and compacts with other nations, including

Cuba, on the subject of fisheries.[3] Fishing disputes between nations have long been a subject of international law. See, *e.g.*, Riesenfeld, *Protection of Coastal Fisheries under International Law* (1942); Leonard, *International Regulation of Fisheries* (1944); Amador, *The Exploitation and Conservation of the Resources of the Sea.* (1959). United States fishing vessels have frequently been charged with violating the territorial waters of foreign countries. See *Hearings of the Subcommittee on Fisheries and Wildlife Conservation of the House Merchant Marine and Fisheries Committee on H.R. 5526 To Protect Rights of United States Vessels on High Seas,* pages 10-18, 85th Cong. 1st Sess. (1957).[4] The federal government has often protested the seizure of United States vessels and fishermen and the physical attacks made upon such vessels. See, *e.g.*, 32 Dep't State Bull. 934-40 (1955).

(b) At the time of the arrests herein, there were numerous federal statutes relating to the protection of wild-life resources.[5] In addition, the Secretary of the Treasury had emergency powers over the movement of foreign vessels in United States teritorial waters, 50 U. S. C. § 191, and

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[3] See, *e.g.*, Convention for the Conservation of Shrimp, 10 UST 1703, TIAS 4321, 358 UNTS 63; Provisional Fur Seal Agreement 58 Stat. 100, 16 U. S. C. 631A-631G; Northern Pacific Halibut Act, 50 Stat. 325, as amended, 16 U. S. C. 772-772(i); 50 CFR 301; and see generally *United Nations Legislative Services, Vol. I, Laws and Regulations of the Regime of the High Seas,* pp. 210-224 (1951).

[4] See also Hearings of the Senate Interstate and Foreign Commerce Committee on S. 1483, 85th Cong., 1st Sess. concerning the rights of United States vessels in the territorial waters of foreign countries.

[5] See, *e.g.*, 16 U. S. C. § 667(a) on state compacts; the Fish and Wildlife Act of 1956, 16 U. S. C. § 742(a); 18 U. S. C. § 41 and 16 U. S. C. § 694(a) on fishing in sanctuaries; 46 U. S. C. 142 (retaliatory suspension of commercial privileges to foreign vessels); 22 U. S. C. § 462 (compelling foreign vessels to depart); 19 U. S. C. § 1435 (entry of foreign vessels).

there was a federal statute apparently prohibiting fishing in the territorial sea but containing no penalties, 46 U. S. C. § 251.

Subsequent to appellants' convictions, the federal government further exercised its exclusive jurisdiction by making it criminally punishable for aliens to do the very acts appellants were convicted of; *i.e.*, taking and possessing fish from United States territorial waters. P. Law 308, 88th Cong., 78 Stat. 194 (May 20, 1964), 16 U. S. C. A. § 1081. This statute was enacted as a direct response to the activity of these appellants. H. Rep. 1356, U. S. C. C. A. 1964, pp. 2183, 2185.

The federal government has the duty to protect American citizens who fish in the territorial waters of other countries. To do so, it must adopt a uniform policy regarding our own territorial waters and be able to enter into treaties with other countries unhampered by the separate policies of each littoral state.

(c) The impact of the statute upon United States relations with Cuba was particularly provocative. The two countries are parties to many bilateral and multilateral treaties. See *Treaties in Force* (1965).[6] In recent years, the federal government has adopted a comprehensive national policy toward Cuba. It has sought to restrict travel. See *Zemel* v. *Rusk*, 381 U. S. 1; it has imposed a trade embargo, Pres. Proc. 3447, 27 F. R. 1085 (1962); and prohibited the furnishing of economic assistance to Cuba, Public Law 205, 88th Cong., 1st Sess., and to countries dealing with Cuba, Exec. Order 11071, 27 F. R. 12875 (1962); Pres. Proc. 3485, 27 F. R. 7371 (1962).[7]

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[6] See, *e.g.*, The Charter of the Organization of American States, 2 UST 2395, TIAS 2361; and the Pact of Bogata signed by the parties but not ratified by the Senate, I Annals of the Organization of American States, 91 (1949).

[7] See also, Foreign Assistance Act of 1961, § 620, 75 Stat. 444 (1961), 22 U. S. C. 2370(a).

More recently, the Treasury Department has prohibited the transfer of Cuban assets in the United States, Cuban Assets Control Regulations, 31 CFR 515.101, *et seq.* (1965), and Congress has passed a vesting statute, International Claims Settlement Act, 78 Stat. 1110, 88th Cong., 2d Sess. Such federal regulation, whatever may be its constitutionality, does establish a national policy which Florida may not constitutionally detract from or supplement.

In the instant case, Florida's arrest of appellants had a potentially dangerous effect upon our foreign relations, provoked public controversy between the Cuban and American governments, and debate in the United Nations;[8] the Cuban Government cut off the water supply of the United States Naval Base at Guantanamo Bay, Cuba, and the base Commander retaliated by cutting the water lines. See 50 Dep't State Bull., 274-282 (1964).

4. The act violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution by arbitrarily denying fishing licenses to a particular class of aliens. It would be frivolous, at best, for Florida to suggest that there is a rational connection between the conservation of fish and the classification of fishermen upon the basis of political ideology. Hence, the act is invalid under this Court's decisions in *Takahashi* v. *Fish and Game Comm'n,* 334 U. S. 410, and *Oyama* v. *California,* 332 U. S. 633.

5. The term "subscribes to the doctrine of international communism" (370.21 [3] F. S. A.) is unconstitutionally vague under this Court's recent decisions in cases touching on freedom of speech and association, *Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Baggett* v. *Bullitt,* 377 U. S. 360. The test of precision in a criminal statute is an even more demanding one than in the civil cases cited above, *Connally* v. *General Const. Co.,* 269 U. S. 385, 391;

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[8] See United Nations Security Council, Docs. S. 5532, S. 5530; 50 DEP'T STATE BULL. 279 (1964).

United States v. *Lattimore*, 215 F. 2d 847 (D. C. Cir. 1954), 127 F. Supp. 405 (D. D. C. 1955); *O'Connor* v. *United States*, 240 F. 2d 404 (D. C. Cir. 1956).

6. The statute also raises substantial procedural problems under the Due Process Clause of the Fourteenth Amendment. It grants to the state Board unlimited administrative discretion to determine who "subscribes to the doctrine of international communism" [(370.21(3) F. S. A.)]. *Cf. Marcus* v. *Search Warrants of Property*, 367 U. S. 717.

The statute also denies procedural due process because it establishes no safeguards as to the manner in which the Board of Conservation determines when a person "subscribes to" a "doctrine of international communism". There are no notices, no charges, no hearing and no appeal. Plainly, this is impermissible practice under the Constitution. See *Morgan* v. *United States*, 304 U. S. 1, 18; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302-304; *Lloyd Sabaudo* v. *Elting*, 287 U. S. 329, 335-336; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274, 288-289.

CONCLUSION

The questions are substantial and the Court should note probable jurisdiction.

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APPENDIX A

Opinion of the Florida Supreme Court

PER CURIAM.

Affirmed. See Uphaus v. Wyman, 360 U. S. 72, 79 Sup. Ct. 1040, 3 L. Ed. 2d 1090; Theodore R. Gibson, et al. v. Florida Legislative Investigating Committee, et al., Fla., 108 So. 2d 729, 360 U. S. 919, 79 Sup. Ct. 1433, 3 L. Ed. 2d 1535.

DREW, C. J., THOMAS, ROBERTS, THORNAL, O'CONNELL, CALDWELL and HOBSON (Retired) JJ., concur.

APPENDIX B

The Florida Territorial Waters Act of 1963 (360.21 FSA)

TERRITORIAL WATERS ACT

CHAPTER 63-202

An Act relating to territorial waters of the state of Florida; prohibiting the licensing of certain alien-owned commercial fishing vessels; making certain operations unlawful when conducted by such vessels in Florida waters; providing for enforcement by harbor masters, sheriffs, agents of the department of conservation and others; providing penalties and effective date.

WHEREAS, it is the sense of the Legislature to protect the vital State resources contained within the territorial waters of Florida in order to conserve the same and secure to the citizens of the State the full benefits of their patrimony, and

WHEREAS, the Legislature intends to deny, within limitations imposed by the Constitution of the United States, to nationals of alien neutral and hostile powers the right to draw upon the resources of waters long considered by the immemorial usages of all civilized peoples a part of our State and Nation.

NOW, THEREFORE,
Be it enacted by the Legislature of the State of Florida:

Section 1. This act may be known and cited as the Florida territorial waters act.

Section 2. It is the purpose of this act to exercise and exert full sovereignty and control of the territorial waters of the State of Florida.

Section 3. No license shall be issued by the board of conservation under section 370.06, Florida Statutes, to any vessel owned in whole or in part by any alien power, which subscribes to the doctrine of international communism, or any subject or national thereof, who subscribes to the doctrine of international communism, or any individual who subscribes to the doctrine of international communism, or who shall have signed a treaty of trade, friendship and alliance or a nonagression pact with any communist power. The board shall grant or withhold said licenses where other alien vessels are involved on the basis of reciprocity and retorsion, unless the nation concerned shall be designated as a friendly ally or neutral by a formal suggestion transmitted to the governor of Florida by the secretary of state of the United States. Upon the receipt of such suggestion licenses shall be granted under section 370.06, Florida Statutes, without regard to reciprocity and retorsion, to vessels of such nations.

Section 4. It is unlawful for any unlicensed alien vessel to take by any means whatsoever, attempt to take, or having so taken to possess, any natural resource of the State's territorial waters, as such waters are described by article I of the Constitution of Florida.

Section 5. It is the duty of all harbor masters of the State of Florida to prevent the use of any port facility in a manner which they reasonably suspect may assist in the violation of this act. Harbor masters shall endeavor by all reasonable means, which may include the inspection of nautical logs, to ascertain from masters of newly arrived vessels of all types other than warships of the United States, the presence of alien commercial fishing vessels within the territorial waters of the State of Florida, and shall transmit such information promptly to the state de-

partment of conservation and such law enforcement agencies of the State as the situation may indicate. Harbor masters shall request assistance from the United States Coast Guard in appropriate cases to prevent unauthorized departure from any port facility.

Section 6. All licensed harbor pilots are required to promptly transmit any knowledge coming to their attention regarding possible violations of this act to the harbor master of the port or the appropriate law enforcement officials.

Section 7. All law enforcement agencies of the state, including but not limited to sheriffs and agents of the department of conservation are empowered and directed to arrest the masters and crews of vessels who are reasonably believed to be in violation of this law, and to seize and detain such vessels, their equipment and catch. Such arresting officers shall take the offending crews or property before the court having jurisdiction of such offenses. All such agencies are directed to request assistance from the United States Coast Guard in the enforcement of this act when having knowledge of vessels operating in violation or probable violation of this act within their jurisdictions when such agencies are without means to effectuate arrest and restraint of vessels and their crews.

Section 8. The fine or imprisonment of persons and confiscation proceedings against vessels, gear and catch prescribed for violations of chapter 370, shall be imposed for violation of this act; provided that nothing herein shall authorize the repurchase of property for a nominal sum by the owner upon proof of lack of complicity in the violation or undertaking.

Section 9. No crew member or master seeking bona fide political asylum shall be fined or imprisoned hereunder.

Section 10. Harbor masters and law enforcement agencies, are authorized to request assistance from the civil air patrol in the surveillance of suspect vessels. Aircraft of the state forestry department or other state or county agencies which are conveniently located and not otherwise occupied may be similarly utilized. Laws 1963, c. 63-202, §§ 1-10.

APPENDIX C

Excerpts From Motion to Quash Informations

I

"The said statute is unconstitutional in that it is an exercise of the foreign affairs and war powers of the United States which subjects are exclusively within the jurisdiction of the federal government under the Constitution of the United States, Article 1, Section 8 and 10, and Article 2, Section 2.

The said statute is invalid under Article I, Sections 1 and 8, Article III, Section 2, and Article 4, Sections 3 and 4 of the United States Constitution and under the Supremacy Clause, Article 5, Section 6, in that the federal government has occupied the field of international fisheries by (a) Presidential Proclamation 2668, 10 F. R. 12304, (b) Convention with Cuba on *Conservation of Shrimp,* TIAS 4321, and (c) the *Fish and Wildlife Coordination Act of March 10, 1934,* P. Law 624, 85th Congress, as amended, 16 U. S. C. *et seq.* and the Fish and Wildlife Act of 1956, 16 U. S. C. 742-a, *et seq.* and (d) by other proclamations, executive orders, statutes, conventions, treaties and participation in international conferences on the territorial seas and related matters.

The arrest and prosecution of the defendants is in violation of (a) their right to due process and to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution . . . and (b) constitutes a letter of marque and reprisal and a bill of attainder under Article I, Section 10 of the said Constitution . . . in that, *inter alia,*

> (i) the statute is directed against 'any vessel owned in whole or in part by any alien power which subscribes to the doctrine of international Commu-

nism, or any subject or national thereof who subscribes to the doctrine of international Communism, or any individual who subscribes to the doctrine of international Communism, or who shall have signed a treaty of trade, friendship and alliance or a non-aggression pact with any Communist power'; and

(ii) the statute specifically exempts from the punitive application any 'crew member or master seeking bona fide political asylum'.

The statute is void for vagueness and the informations herein do not adequately state 'the nature and cause of the accusations' . . . under the due process clause of the Fourteenth Amendment to the Constitution of the United States by reason, *inter alia,* of the use of the terms (a) 'territorial waters', (b) 'subscribes to the doctrine of international Communism', (3) 'seeking bona fide political asylum', and (4) 'the natural resources of the State of Florida.'

The prosecution of a national of a foreign country under the said statute is a denial of due process under . . . the Fourteenth Amendment to the United States Constitution in that no presumption of notice of the existence of a state law, particularly one of such character, can reasonably be imputed to such foreign national."

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 722

MANUEL GOMEZ BARRIOS, JOSE GARCIA RODRIGUEZ, JOSE MANUEL VENTURA VENTURA, EVALDO ESCANDEL SOTO, APPELLANTS

v.

STATE OF FLORIDA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of January 17, 1966, inviting the Solicitor General to express the views of the United States. The issue raised by appellants that involves the special interests of the United States is the question whether their prosecutions under Florida law interfered with the powers of the federal government; we address ourselves to that aspect of the case.

On February 2, 1964, the United States Coast Guard observed that appellants, Cuban nationals and masters of fishing vessels owned by the Cuban government, were fishing in the territorial waters of the

207-588—66

United States, less than two miles from the coast of East Key, an island constituting part of Florida. Appellants were apprehended by Coast Guard personnel, who, after consultation with the Department of State, turned them over to the appropriate law enforcement officials of the State of Florida at the latters' request.[1] The action of the Coast Guard and the State Department was taken because, at that time, federal law did not provide penalties for appellants' conduct, whereas appellants were subject to punishment under Florida law.[2]

The relevant Florida statutes are Fla. Stat. Ann. § 370.06, dealing with licenses for taking natural resources from the State's tide or salt waters, and the Florida Territorial Waters Act, Fla. Stat. Ann. (Supp. 1964) § 370.21, limiting the types of persons who may obtain licenses. The former statute requires that owners or masters of commercial fishing vessels pay license fees and obtain licenses before taking salt water products from the tide or salt waters of Florida (§ 1); that aliens and nonresidents must pay an additional "license tax" on vessels used for commercial purposes (§ 2); that aliens and nonresidents must pay an "annual license tax" for taking salt water fish from Florida waters for commercial purposes (§ 4); and that violations of the statute are

[1] See 50 Dept. State Bull. 276–278 (1964), where the Secretary of State described the United States government's role in the matter.

[2] *Id.* at 277.

punishable by fine or imprisonment or both (§ 9).

The Florida Territorial Waters Act provides in Section 3 that:

> No license shall be issued by the board of conservation under § 370.06, to any vessel owned in whole or in part by any alien power, which subscribes to the doctrine of international communism, or any subject or national thereof, who subscribes to the doctrine of international communism, or any individual who subscribes to the doctrine of international communism, or who shall have signed a treaty of trade, friendship and alliance or a nonaggression pact with any communist power. * * *

The same Act further provides that other alien vessels shall be granted or refused licenses on the basis of reciprocity, retorsion and suggestions by the Secretary of State of the United States (§ 3); that it is unlawful for any unlicensed alien vessel to take any natural resource from the State's territorial waters (§ 4); that violations of the Act shall be punished in the same manner as other violations of chapter 370 (§ 8); and that crew members or masters seeking political asylum shall not be fined or imprisoned under the Act (§ 9).

Appellants were convicted of taking and possessing natural resources from Florida's territorial waters without a license, a misdemeanor, and each was fined $500, which he paid. On appeal, the Supreme Court of Florida affirmed (J.S. App. A).

Appellants first contend (J.S. 5–7) that their convictions under State law are unconstitutional on the ground that the regulation of fishing by aliens in ter-

ritorial waters is exclusively a matter for the federal government. Alternatively, they contend (J.S. 7–10) that, even if the States may legislate in this area in the absence of federal regulation, the federal government has occupied the field by various treaties, statutes and administrative regulations.[3] If the latter contention is correct, of course, there would be no need for this Court to reach the broader constitutional problem raised by appellants' first argument.

As raised in the present case, however, the question of federal occupation of the field has been rendered academic by the Bartlett Act, Act of May 20, 1964, 78 Stat. 194, 16 U.S.C. 1081–1085, passed subsequent to appellants' convictions. The Bartlett Act makes it unlawful for any foreign vessel to fish within the territorial waters of the United States without obtaining authorization from the federal government. In addition to establishing the standards to be applied in granting or withholding such authorization, the Act provides criminal penalties for violations and contains detailed provisions for enforcement.

Whether or not this statute wholly excludes State laws concerning fishing by foreign vessels, at the present time and for the foreseeable future, the question whether the federal government has occupied this field, to the exclusion of the States, will require consideration of the 1964 Act. Furthermore, the very existence of a federal sanction for unauthorized fish-

[3] Appellants' prosecutions were not in violation of any treaty, statute or regulation. The authorities cited in the Jurisdictional Statement are presumably intended to show the activities of the federal government in connection with fisheries and foreign vessels in general.

ing by foreign vessels in American waters renders future State prosecutions highly unlikely. A decision on the preemption issue in the present case, therefore, would be without prospective significance. Indeed, since appellants have already paid their fines [4] and, we are informed, have left the country, the case appears to lack immediate significance as well. We therefore suggest that the principal issue presented in this case lacks the substantiality requisite for consideration by this Court.[5]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1966.

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[4] This fact may well render the case moot (see *St. Pierre* v. *United States*, 319 U.S. 41) since none of the "collateral consequences" of conviction which this Court has previously found sufficient to keep cases alive (see *Pollard* v. *United States*, 352 U.S. 354, 358; *Fiswick* v. *United States*, 329 U.S. 211, 220–223) are present here.

As we understand Florida law, appellants are not entitled to recover the fines they have paid, except through executive clemency. See *City of Miami* v. *Keton*, 115 So. 2d 547, 551 (Fla. Sup. Ct.); *Grant* v. *Dubbs*, 108 Fla. 116. They could have stayed the execution of their sentences, and thus refrained from paying the fines imposed, merely by filing a notice of appeal and executing a supersedeas bond. Fla. Stat. Ann. § 924.14.

[5] In these circumstances, no extended discussion of the merits of appellants' contentions is in order. We note, however, that the State Department has advised us that the actions of the State of Florida in this case did not interfere with the conduct of our foreign relations. See 50 State Dept. Bull. 276–278 (1964).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 722

MANUEL GOMEZ BARRIOS,
JOSE GARCIA RODRIGUEZ,
JOSE MANUEL VENTURA VENTURA,
EVALDO ESCANDEL SOTO

Appellants,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

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IN THE

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October Term, 1965

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Appellee.

ON APPEAL FROM THE SUPREME COURT
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STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

STATEMENT OF APELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

The appellants, pursuant to applicable provisions of controlling law, have heretofore filed their jurisdictional statement supplementing their appeal from an order of the Supreme Court of the State of Florida. The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions sought to be presented by such appeal, file this Statement in Opposition to Appellants Jurisdictional Statement and includes its

Motion to Affirm the Judgment of the Court below, upon the ground that the question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

STATEMENT

The appellee adopts the appellants' statement of the case with the exception of the conclusions of fact or law that might be contained therein.

ARGUMENT

1. The questions presented in this appeal are plainly unsubstantial and the case should therefore be dismissed. In this connection, it is appropriate to point out that on May 20, 1964, shortly after the arrests and convictions herein, Congress enacted 16 U.S.C.A. Section 1081 (see Appendix A).

Said legislation is considerably broader in scope and effect in Section 370.21, Florida Statutes (See Appendix B). In all likelihood the Federal act has preempted Section 370.21, Florida Statutes. The possibility of another prosecution under Section 370.21, Florida Statutes is extremely remote. The decision below affects no one other than the litigants.

The application of Section 370.21, Florida Statutes to the appellants may be characterized as episodic. The

resolution of the questions presented in the instant matter will have no immediate importance beyond the particular facts and parties involved. The questions presented in this case have no importance to the public as distinguished from importance to the particular parties involved. The appeal should, therefore, be dismissed. *Layne & Bowles Corp. v. Western Well Works,* 261 U. S. 387, 393. *Rice v. Sioux City Cemetery,* 349 U. S. 70, 79.

As far as the individuals are concerned the questions are moot. Appellants were each sentenced to six months in the county jail. Said sentence was suspended on the condition that a fine of $500.00 each be paid (R 138). The fines were paid. (See page ix of appellants' brief filed in the Supreme Court of Florida. Said brief has been lodged with the record as Appellee's Exhibit No. 1.) Voluntary payment of the fine imposed terminates the action and precludes a review of the conviction. *Bergdoll v. U. S.,* 279 F. 404; See also 18 ALR 867; 74 ALR 638; 4 Am. Jur. 2d, *Appeal and Error,* Section 272, P. 766.

Even a reversal of the decision of the Florida Supreme Court would not inure to the benefit of the appellants. Having paid their fines, appellants may not recover their money. *City of Miami v. Keton,* (Fla. 1959) 115 So. 2d 547 and authorities cited therein. It is therefore submitted that no substantial issues are presented by this appeal.

2. Appellants have no standing. As will be presently shown, Section 370.21, Florida Statutes, is constitutional. When a statute, valid on its face, requires the issuance of a license as a condition precedent to carrying on a certain

activity, one who is within the terms of the statute, but who has failed to make the required application, is not at liberty to complain of his anticipation of improper or invalid action in administration. *Smith v. Cahoon*, 283 U. S. 553. Appellants not having made application for a license, may not now challenge the validity of the licensing statute.

3. Appellants assert that Section 370.21, Florida Statutes, is an unconstitutional interference with the exclusive federal power over foreign relations, foreign commerce and war. In support of this assertion, appellants point to the fact that at the time of the arrests there were many federal statutes relating to the protection of wildlife resources. Appellants have not shown, however, a single federal statute in conflict with Section 370.21, Florida Statutes.

(a) A state also has the power to conserve the natural resources within its boundaries. *Skipper-Bivens Oil Co. v. State*, 115 S.W. 2d 1016. In the absence of regulation by the United States, a state can regulate within its territory the liberty of fishing in its waters. *Manchester v. Massachusetts*, 139 U.S. 240. At the time of the arrests herein, Congress had passed no legislation in conflict with nor repugnant to Section 370.21, Florida Statutes. The decisions of this court enjoin seeking out conflicts between state and federal regulations where none clearly exists. *Huron, Portland Cement Co. v. Detroit*, 362 U.S. 440.

(b) Appellants' contentions with respect to the relations of the Federal Government with Cuba may be summarily

dismissed by referring the court to 50 Dept. State Bull. 276-279.

Secretary of State Dean Rusk, during a news conference on February 7, 1964, said:

> "Federal authorities, from their investigation and interrogation, concluded that the Cuban vessels were fishing in the territorial waters of the United States contrary to section 251 of title 46 of the United States Code. However, as this statute contains no penalties, prosecution by Federal authorities was not undertaken. As the boats and crews were also in probable violation of the laws of the State of Florida and thus subject to prosecution by State authorities, the Coast Guard allowed the State of Florida to assume jurisdiction. *This step was undertaken in consultation with the Department of State.*" (Emphasis supplied) (50 Dept. State Bull. 277)

In a letter to the President of the United Nations Security Council, the late Adlai Stevenson said:

> "Federal authorities completed their investigation and interrogation of the crews on February 5, 1964. The authorities concluded that the Cuban vessels were fishing in the territorial waters of the United States contrary to Section 251 of Title 46 of the United States Code. However, as this statute contains no sanctions, prosecution by Federal authorities was not undertaken. *At the same time, the Cuban fishing boats*

> *were also in probable violation of laws of the state of Florida and thus subject to prosecution by state authorities.* State officials formally requested the United States Coast Guard to turn the boats and crews over to the jurisdiction of the state. *In accordance with United States law, this was done on February 5, 1964.* Legal proceedings before the state courts are pending." (Emphasis supplied) (50 Dept. State Bull. 279)

Therefore, it appears that, far from appellants' contention, the actions of the State of Florida under Section 370.21, Florida Statutes, were taken with the approval of the Department of State, the Federal agency charged with carrying out the foreign policy of the United States.

In addition, appellants were apprehended by the United States Coast Guard. They were escorted by the Coast Guard to Key West, after consultation with the Department of State. 50 Dept. State Bull. 276. The original arrest was not made at the request of the State of Florida. The idea to arrest the appellants originated in the Federal Government. Appellants' assertions in this matter are patently spurious.

4. Appellants contend that Section 370.21, Florida Statutes, denies the equal protection of the laws to a particular class of aliens. An examination of the statute is sufficient to refute this contention.

Subsection (3) of Section 370.21, Florida Statutes, prohibits the issuance of a license to any individual who subscribes to the doctrine of international communism. The

statute thus denies a license to a citizen of the United States, the State of Florida or of a foreign state whatever its form of government, if such person subscribes to the doctrine of international communism. The most militant anti-communist, of whatever nationality, is subject to fine and imprisonment if aboard an unlicensed alien vessel that fishes in Florida waters. Contrary to appellants' contentions, therefore, Section 370.21, Florida Statutes, does not affect a particular class of aliens.

The state has the power to discriminate against "persons who subscribe to the doctrines of international communism". The denial of licenses to such persons has a rational basis and is not arbitrary. *Bryant v. Zimmerman*, 278 U. S. 63; *Hernandez v. Texas*, 347 U. S. 475; *Griffin v. Illinois*, 351 U. S. 12.

In *Uphaus v. Wyman*, 360 U. S. 72, the court recognized the state's right to protect itself. An attack or act of sabotage carried out against the United States endangers the lives and property of the citizens of the State. World tensions as they are, Section 370.21, Florida Statutes, does not make an unreasonable classification. It has the effect of keeping those persons most likely to launch such an attack away from our shores. The national defense is not an exclusively federal function so as to preclude the cooperation of the States. *State ex rel. Gibbs v. Gordon*, (Fla. 1939), 189 So. 437.

The court has often recognized the propriety of loyalty oaths and questionnaires to determine the fitness of persons

to occupy certain positions. *Konigsberg v. State Bar of California*, 336 U. S. 36; *In re Anastaplo*, 366 U. S. 82; *Adler v. Bd. of Education*, 342 U. S. 485; *Garner v. Bd. of Public Works of Los Angeles*, 341 U. S. 716; *Gerende v. Bd. of Elections of Baltimore*, 341 U. S. 56; *American Communications Ass'n v. Douds*, 339 U. S. 382. It follows then that the state may exclude from its territorial waters persons who in the light of present day world tensions, are apt to commit acts against the United States and which acts are dangerous to the lives and property of the citizens of the state.

5. Section 370.21, Florida Statutes, clearly and explicitly prohibits the taking and possessing, from the territorial waters of Florida, the resources of the state by an unlicensed alien vessel. The statute is not vague. In short, it prohibits alien vessels from fishing without a license.

Appellants, however, contend that the phrase "subscribes to the doctrine of international communism", Section 370.21 (3), Florida Statutes, is unconstitutionally vague. In the cases cited by appellants in support of this argument, the person who was required to interpret similar words was also subject to a penalty (perjury, dismissal, etc.). The fact that the words were vague placed the person in danger of the penalty if his interpretation of the words did not coincide with that of some other authority. Not so with the instant statute. It clearly and explicitly prohibits unlicensed fishing. The appellants were not required to make a decision based upon their interpretation of the words "subscribes to the doctrines of international

communism". They were required to obtain a license before they fished. The Florida Board of Conservation might be required to determine the meaning of the words, but appellants were not. They are therefore in no position to challenge the validity of the statute on grounds of vagueness.

6. Appellants contend that Section 370.21, Florida Statutes, grants the Board unlimited administrative discretion to determine who "subscribes to the doctrine of international communism." This point was not raised in the court below (Appellee's Exhibit No. 1), and cannot be considered. *McGowan v. Maryland,* 366 U. S. 420; *Sherman v. U. S.,* 356 U. S. 369; *DeSylva v. Ballentine,* 351 U. S. 570. Be that as it may, however, the determination of the Florida Board of Conservation is subject to review. Chapter 120, Florida Statutes, provides for such review. Provision for notice and charges are inappropriate in a licensing statute. It is the appellants' duty to initiate the proceedings.

CONCLUSION

It is respectfully submitted by the appellee that the questions submitted for decision by this court by the appellants are not substantial and urge the granting of appellee's motion to affirm.

Respectively submitted,

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APPENDICES

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APPENDIX A

Title 16, U.S.C.A. §1081

PROHIBITION AGAINST FISHING IN TERRITORIAL WATERS; EXCEPTIONS

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of the Interior that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a

finding by the Secretary of the Interior that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of the Interior, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest. Pub.L. 88–308, § 1, May 20, 1964, 78 Stat. 194.

APPENDIX B

The Florida Territorial Waters Act of 1963 (Section 370.21, Florida Statutes)

TERRITORIAL WATERS ACT

Chapter 63-202

An Act relating to territorial waters of the state of Florida; prohibiting the licensing of certain alien-owned commercial fishing vessels; making certain operations unlawful when conducted by such vessels in Florida

waters; providing for enforcement by harbor masters, sheriffs, agents of the department of conservation and others; providing penalties and effective date.

Whereas, it is the sense of the Legislature to protect the vital State resources contained within the territorial waters of Florida in order to conserve the same and secure to the citizens of the State the full benefits of their patrimony, and

Whereas, the Legislature intends to deny, within limitations imposed by the Constitution of the United States, to nationals of alien neutral and hostile powers the right to draw upon the resources of waters long considered by the immemorial usages of all civilized peoples a part of our State and Nation.

Now, Therefore,

Be it enacted by the Legislature of the State of Florida:

Section 1. This act may be known and cited as the Florida territorial waters act.

Section 2. It is the purpose of this act to exercise and exert full sovereignty and control of the territorial waters of the State of Florida.

Section 3. No license shall be issued by the board of conservation under section 370.06, Florida Statutes, to any vessel owned in whole or in part by any alien power, which

subscribes to the doctrine of international communism, or any subject or national thereof, who subscribes to the doctrine of international communism, or any individual who subscribes to the doctrine of international communism, or who shall have signed a treaty of trade, friendship and alliance or a nonagression pact with any communist power. The board shall grant or withhold said licenses where other alien vessels are involved on the basis of reciprocity and retorsion, unless the nation concerned shall be designated as a friendly ally or neutral by a formal suggestion transmitted to the governor of Florida by the secretary of state of the United States. Upon the receipt of such suggestion licenses shall be granted under section 370.06, Florida Statutes, without regard to reciprocity and retorsion, to vessels of such nations.

Section 4. It is unlawful for any unlicensed alien vessel to take by any means whatsoever, attempt to take, or having so taken to possess, any natural resource of the State's territorial waters, as such waters are described by article I of the Constitution of Florida.

Section 5. It is the duty of all harbor masters of the State of Florida to prevent the use of any port facility in a manner which they reasonably suspect may assist in the violation of this act. Harbor masters shall endeavor by all reasonable means, which may include the inspection of nautical logs, to ascertain from masters of newly arrived vessels of all types other than warships of the United States, the presence of alien commercial fishing vessels within the territorial waters of the State of Florida, and

shall transmit such information promptly to the state department of conservation and such law enforcement agencies of the State as the situation may indicate. Harbor masters shall request assistance from the United States Coast Guard in appropriate cases to prevent unauthorized departure from any port facility.

Section 6. All licensed harbor pilots are required to promptly transmit any knowledge coming to their attention regarding possible violations of this act to the harbor master of the port or the appropriate law enforcement officials.

Section 7. All law enforcement agencies of the state, including but not limited to sheriffs and agents of the department of conservation are empowered and directed to arrest the masters and crews of vessels who are reasonably believed to be in violation of this law, and to seize and detain such vessels, their equipment and catch. Such arresting officers shall take the offending crews or property before the court having jurisdiction of such offenses. All such agencies are directed to request assistance from the United States Coast Guard in the enforcement of this act when having knowledge of vessels operating in violation or probable violation of this act within their jurisdictions when such agencies are without means to effectuate arrest and restraint of vessels and their crews.

Section 8. The fine or imprisonment of persons and confiscation proceedings against vessels, gear and catch prescribed for violations of chapter 370, shall be imposed

for violation of this act; provided that nothing herein shall authorize the repurchase of property for a nominal sum by the owner upon proof of lack of complicity in the violation or undertaking.

Section 9. No crew member or master seeking bona fide political asylum shall be fined or imprisoned hereunder.

Section 10. Harbor masters and law enforcement agencies, are authorized to request assistance from the civil air patrol in the surveillance of suspect vessels. Aircraft of the state forestry department or other state or county agencies which are conveniently located and not otherwise occupied may be similarly utilized. Laws 1963, c. 63-202, §§ 1-10.

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STATE OF FLORIDA.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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Of Counsel:
MICHAEL B. STANDARD,
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IN THE

Supreme Court of the United States

October Term, 1965

No. 722

MANUEL GOMEZ BARRIOS, JOSE GARCIA RODRIGUEZ, JOSE MANUEL VENTURA VENTURA, EVALDO ESCANDEL SOTO,
Appellants,

v.

STATE OF FLORIDA.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF IN OPPOSITION

1. The regulation of foreign affairs is, in appellants' view, a subject of *exclusive* federal power. But if the power is concurrent with the states', the area has been occupied by federal legislation and hence state legislation is preempted under the Supremacy Clause. While the field was occupied before the passage of the Bartlett Act, 78 Stat. 194, 16 U. S. C. §§ 1081-85 (Jur. St. pp. 5-9), preemption is even clearer as a result of that statute.

2. The Solicitor General's position is that "the question whether the federal government has occupied this field, to the exclusion of the States, will require consideration of the 1964 Act." (Memo p. 4.) We agree. Under this Court's recent decisions, it will consider the significance and effect of the 1964 Act. In *Hamm* v. *Rock Hill*, 379 U. S. 306, the Court decided affirmatively the precise

question presented here, *i.e.*, does the federal Supremacy Clause abate state action where a federal statute is enacted between the date of conviction and completion of appellate review? The Court there held that "[f]uture state prosecutions under the Act being unconstitutional", 379 U. S. 315, both principles of statutory construction and the Supremacy Clause require that the convictions must abate. *Cf. Bell* v. *Maryland,* 378 U. S. 226.

Similarly, in *Linkletter* v. *Walker,* 381 U. S. 618, 627, the Court reviewed the "form of limited retroaction" which is present here and held that "[u]nder our cases it appears (1) that a change in law will be given effect while a case is on direct review. *Schooner Peggy* . . ."[1] (And see *Linkletter* v. *Walker, supra,* at 627, n. 11.)

3. Both the appellee (Motion p. 2) and the United States (Memo. pp. 4-5) suggest that the question is insubstantial because the possibility of future prosecutions under Fla. Stat. Ann. § 370.21 is remote in view of the passage of the Bartlett Act. The Attorney General cannot commit the State of Florida to a permanent course of action or inaction; in any event, the relation of the United States with other sovereigns is an issue of such

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[1] In *United States* v. *Schooner Peggy,* 5 U. S. (1 Cranch 103, 110) Chief Justice Marshall stated, "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . [the law] ought always to receive a construction conforming to its manifest import. . . . In such cases the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

great public importance, that it transcends the particular prosecution. The question here is no less substantial than the questions presented in almost identical posture in *Hamm* v. *Rock Hill,* 379 U. S. 306 and *Hines* v. *Davidowitz,* 312 U. S. 52.

4. The cause is not moot by reason of appellants' payment of fines whether the matter be treated as one of state or federal law.

a. The law of Florida is not that the payment of a fine renders an appeal moot.

Both the Solicitor General and the Attorney General incorrectly cite *City of Miami* v. *Keton,* 115 So. 2d 547 (Fla. 1959) and *Grant* v. *Dubbs,* (*sub. nom. Granat* v. *Dulbs*), 108 Fla. 116, 145 So. 879 (1933) for the proposition that fines cannot be recovered. In neither case did the defendants appeal their convictions;[2] each instead sought to regain the fine imposed by collateral attack.

The issue of the mootness of this case under Florida law has been resolved by the Supreme Court of Florida. In the oral argument herein counsel, at the request of the Court, addressed themselves to the mootness question. That Court then affirmed on the merits.

The determination of this appeal on the merits by the Court below, if not conclusive, is at least entitled to great weight on this point. In any event, upon reversal of a conviction due process requires return of the fines. *Giacco* v. *Pennsylvania,* Oct. Term 1965 No. 52, 34 L. Wk. 4099.

b. The decisions in *St. Pierre* v. *United States,* 319 U. S. 41, *Pollard* v. *United States,* 352 U. S. 354 and *Fiswick* v. *United States,* 329 U. S. 211, cited by the Solicitor General in suggesting that the case "may" be moot are inapposite (Memo, p. 5). All these dealt with con-

[2] In the *City of Miami* v. *Keton* case the rationale of the court was the failure of the defendants to appeal.

victions in which the defendant had served his term of incarceration. None of these cases involved the payment of fines. This Court has never decided that where, following a conviction a fine has been paid as a condition of release from custody and no serious collateral infirmity attends a refusal to review, that the cause is moot.[3]

5. Appellee's suggestion that appellants have no standing appears based on the assumption that since no preliminary application for a license was made, appellants cannot complain of either the validity of the statute or the sanction imposed pursuant to its terms. Appellee's reliance on the Court's decision in *Smith* v. *Cahoon,* 283 U. S. 553 is misplaced.

The Court held in *Smith* v. *Cahoon, supra,* at 562, that where a licensing statute is unconstitutional on its face, there is no necessity to apply for a license as a condition precedent to testing its validity. In accord, *Chicago* v. *Acheson, Topeka & Santa Fe Ry.,* 357 U. S. 77, 89; *Public Utilities Comm'n* v. *United States,* 355 U. S. 534, 539-40; *cf. Lovell* v. *Griffin,* 303 U. S. 444, 452; *Jones* v. *Opelika,* 316 U. S. 584, 602, adopted per curiam 319 U. S. 103, 104; *Winters* v. *United States,* 333 U. S. 507; *Staub* v. *City of Baxley,* 355 U. S. 313.

6. Both the respondent (Motion, p. 4) and the Solicitor General (Memo, p. 5, n. 5) argue that the action of appellants in fact did not interfere with the United States' conduct of its foreign relations. The contrary is true. (See Jurisdictional Statement, p. 10.) More particularly, the issue is not whether in fact there was an interference, but rather whether the statute in question, Fla. Stat. Ann. § 370.21 *in terms* interferes with the exclusive power of the federal government to conduct United States' relations

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[3] The federal courts are in conflict in appeals from federal convictions where fines have been paid. See *Virgin Islands* v. *Ferrer,* 275 F. 2d 497 (3d Cir. 1960); *Bergdoll* v. *United States,* 279 Fed. 404 (3d Cir. 1922), as compared with *Hartzell* v. *United States,* 107 F. 2d 359 (5th Cir. 1939).

with other governments.[4] A statute which conditions license issuance or sanction upon a "designat[ion] as a friendly ally or neutral by a formal suggestion transmitted to the governor of Florida by the Secretary of State of the United States", Fla. Stat. Ann. § 307.21(3) (Jur. St. App., p. 15) by statutory definition imposes a burden on the United States representing interference in the conduct of its external affairs.

Respectfully submitted,

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[4] Respondent's suggestion that § 370.21 was enacted as a conservation measure, and that "in the absence of regulation by the United States, a state can regulate within its territory the liberality of fishing in its waters" is inaccurate. The language of the state law attests to its purpose. The Submerged Lands Act of 1953, 43 U. S. C. §§ 1301, 1314(a) explicitly reserved to the United States exclusive power over territorial waters where questions of international affairs were at issue (Jur. St., p. 6).

Of respondent's contention that § 370.21 applied to citizens of the United States, one need only refer to the explicit Title and preamble of the Act. The Act not only discriminates against aliens but against a particular class of aliens with no rational nexus between the ostensible purposes of conservation and the classification of aliens on the basis of political ideology.

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